IN THE

Supreme Court of the United States

October Term, 1926.

Western Union Telegraph Company, Appellant,

v. No. 101.

State of Arkansas, ex rel. H. W. Applegate, as Attorney General, Appellee.

OPPOSITION TO PETITION FOR REHEARING

H. W. Applegate,

Attorney General of the State of Arkansas.

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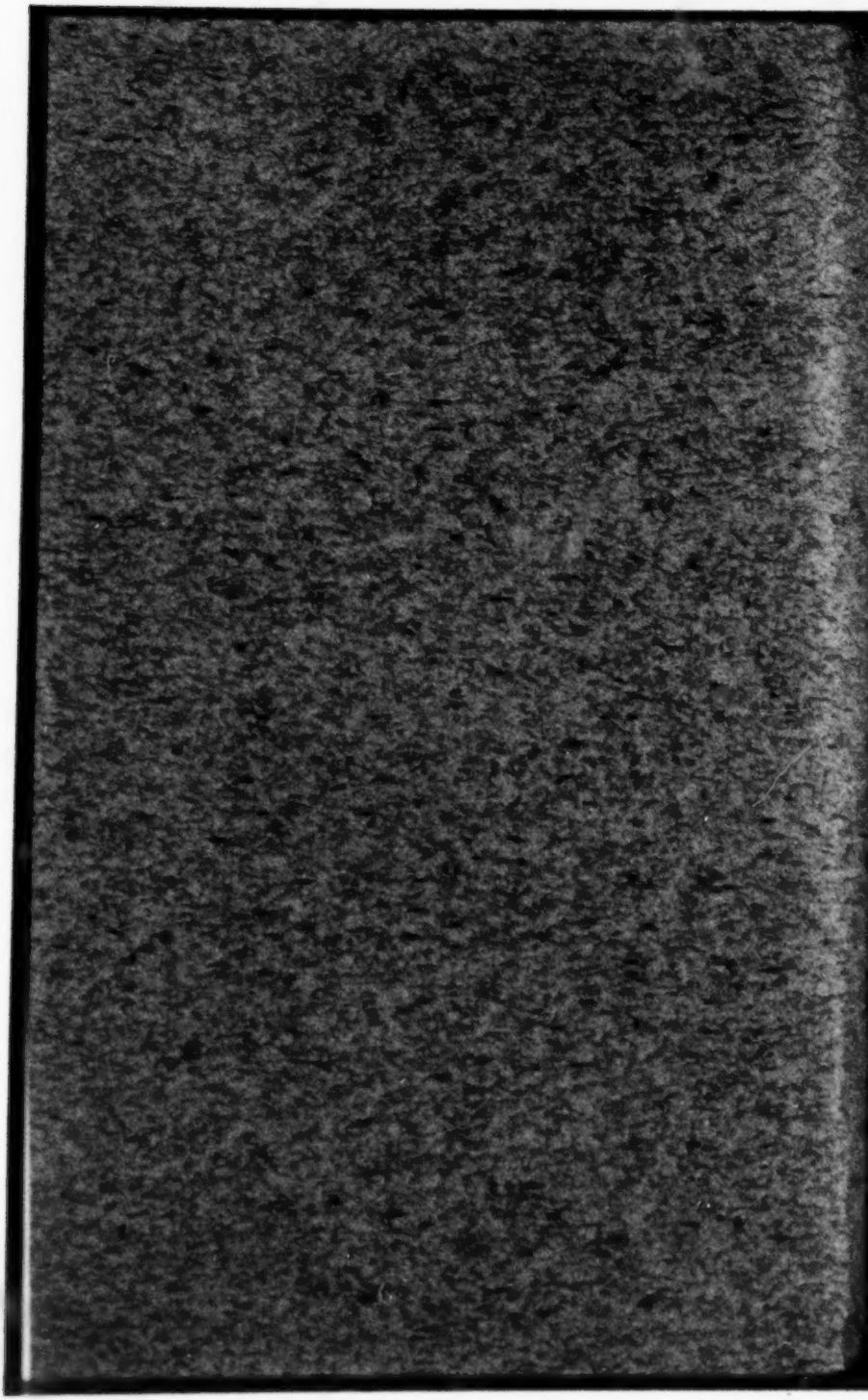

IN THE

Supreme Court of the United States

October Term, 1928.

WHITE RIVER LUMBER COMPANY ..... *Appellant*,

v. No. 101.

STATE OF ARKANSAS, EX REL. H. W. APPLEGATE, AS ATTORNEY GENERAL ..... *Appellee*.

OPPOSITION TO PETITION FOR REHEARING

Appellant's petition for rehearing is based solely on specifications of error Nos. 3, 4, 5, 6 and 7, no mention being made of Nos. 1, 2 and 8. The substance of the specifications now in question is as follows:

No. 3 alleges that the Supreme Court of Arkansas erred in valuing and assessing 34 separate tracts of timber land according to the average value of all rather than requiring each tract to be valued and assessed separately like the lands of natural persons.

No. 4: That the court erred in valuing and assessing appellant's lands according to their average value

for the twelve year period rather than requiring them to be valued and assessed for each two year period separately as the lands of natural persons are valued and assessed.

No. 5: That the court erred in raising appellant's assessment when the testimony upon which its action was based was confined partly to a later period.

No. 6: That the court erred in assessing appellant's lands on the basis of an average value of all of the lands during all of the years without requiring each tract to be assessed separately for each year separately.

No. 7: That the court erred in assessing appellant's lands higher than other lands of like character and value in that taxing district were assessed.

In the above specifications appellant alleged that the action of the State court denied appellant the equal protection of the laws and took its property without due process of law in violation of the Federal Constitution.

This court declined to pass upon these specifications of error because it does not appear from the record that the constitutional question was presented in or passed upon by the State Supreme Court.

Counsel for appellant now say, on page 2 of their petition:

"The question involved did not arise until the decision of this case by the Supreme Court of Arkan-

sas, and consequently could not have been raised by appellant prior to that time, nor in any other way than by a petition for rehearing in that court."

We believe the above admission by appellant that the question *was not raised except by petition for rehearing in the State court* automatically defeats the present petition. This court has expressly so held in the case of *Kansas City Star Co.* v. *Julian*, 215 U. S. 589, in which it was said:

> "A writ of error will not lie to a State court on the ground that a Federal question is involved, where such question was first raised in the State court in the petition for rehearing."

In the following cases, among others, this rule was also applied:

Mergenthaler Linotype Co. v. *Davis*, 251 U. S. 256.

Pogdras De La Lande v. *Louisiana*, 18 How. 192.

Sayward v. *Denny*, 158 U. S. 180.

Capital National Bank v. *First National Bank*, 172 U. S. 425.

Turner v. *Richardson*, 180 U. S. 87.

Weber v. *Rogan*, 188 U. S. 10.

Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291.

Since it is admitted by appellant that the question was not raised in the State court except in its petition for rehearing, we submit the petition now under consideration is without merit.

Counsel say:

"The question involved did not arise until the decision of this case by the Supreme Court of Arkansas."

We submit that is not true. The Arkansas Supreme Court made the same finding that was made by the trial court except that it declined to render judgment on the 37,000-acre group of lands, and it reduced the value of the Big Island group from $50 an acre (found by the trial court) to $40 an acre. The finding of the State Supreme Court was much more favorable to appellant than that of the trial court.

The same questions of fact and of law were presented to both the chancellor and the State Supreme Court. Necessarily the same questions arose, as there was, of course, only one transcript of testimony, and it was used before both courts. If, as counsel say, the testimony was partly of a date subsequent to years for which taxes are sought, that question necessarily was before the chancellor and should have been raised before the State Supreme Court on the constitutional ground now set up. This was not done, and it does not appear anywhere in the record.

If appellant's lands were assessed higher than other similar lands of equal value in the taxing dis-

trict, as is alleged in specification of error No. 7, then that offense was necessarily first committed by the trial court, as that court's assessment was even higher than that of the State Supreme Court. This being true, it was incumbent upon counsel to raise their consitutional objection in the State court on appeal, and not wait until filing a petition for rehearing to do so.

The questions as to the average basis of valuation and assessment should likewise have been raised before filing a petition for rehearing, as the decision of the chancellor was exactly the same on these points as that of the State Supreme Court, except that the latter court reduced the values.

We think it will be seen from the foregoing self-evident facts that counsel are in error when they say the questions now presented did not arise until after the decision by the State Supreme Court.

There are cited in appellant's petition (page 3) three decisions to sustain their contention that the constitutional question involved was sufficiently presented in the State court, to wit:

Whitney v. *California*, 274 U. S. 357.

Marvin v. *Trout*, 199 U. S. 212.

Consolidated Turnpike Co. v. *N. & O. V. Ry. Co.*, 228 U. S. 596.

By merely a casual reference to those cases it will be seen they are not in point. In each of them there had been filed as a part of the record *a certificate*

of the presiding judge of the State Supreme Court, or the court itself, that the constitutional question involved had been presented. In this case there was not, nor does appellant contend there was, any certificate whatever filed. The authorities cited on this point are therefore, we submit, of no value in this case.

The only other authorities cited by appellant are the following:

Cincinnati Packet Co. v. *Bay*, 200 U. S. 179.

C. R. I. & P. Ry. Co. v. *Perry*, 259 U. S. 548.

By reading counsel's quotations on pages 3 and 4 it will be seen the cases are not in point. The former involved a "certificate" similar to those mentioned above. In the latter the court "actually dealt with and passed upon the question raised." In neither was the question presented for the first time in a petition for rehearing. They are therefore not authorities sustaining appellant's contention in this case.

On page 3 of their petition counsel say:

"The petition (for rehearing) was denied without an opinion."

If, then, the constitutional question was raised only in the petition for rehearing, which is conceded, and the State court wrote no opinion in overruling the petition, there is necessarily no showing whatever that the constitutional question was ever considered by that court. As a matter of fact, these questions

could have been decided by the court without the consideration of the constitutional question; it did not *necessarily* arise. In view of the authorities we have already cited, we think, however, that this point is immaterial.

On page 4 counsel quote a stipulation entered into by the respective parties as follows:

"It is agreed by the parties hereto that the entire record in this case is necessary for the consideration of the points involved."

It was not, of course, the intention of either party to try to bring before the court something that was not, and could not be, a part of the record, nor does the stipulation so state. It was merely for the purpose of showing that the entire record, rather than only a part of it, was necessary for the decision of this court.

Counsel say (page 4) the clerk of this court omitted the petition for rehearing from the record, and "upon inquiry of the clerk, having in charge the printing of records, as to why this petition for rehearing had been omitted, counsel for appellant was informed that the omission was made pursuant to instructions from this court, to the effect that petitions for rehearing should not be printed in the record."

Counsel must have known that a petition for rehearing in the State court constitutes no part of the record on appeal to this court.

Grame v. *Mutual Assur. Soc.*, 154 U. S. 676.

Simmerman v. *Nebraska*, 116 U. S. 54.

This being true, counsel had no right to insist upon the printing of the petition for rehearing, nor could the respective attorneys have accomplished that purpose by stipulation if it had in fact been attemped. If printed, the court would not, we assume, have considered it a part of the record.

We think all questions raised in appellant's petition have been answered. It should not be assumed, however, that appellee admits any of the *facts* alleged in the specifications of error. They have all been vigorously denied throughout the suit, and the State court has made its findings upon conflicting testimony.

Respectfully submitted,

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Attorney General of the State of Arkansas.,

R. E. L. Johnson,
John M. Rose,
Special Counsel for the State of Arkansas.